

**Ornamental Iron Work Co. and Iron Workers Shopmen's Local Union No. 468 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.** Case 8-CA-20463

April 9, 1992

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On June 15, 1989, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> directing Ornamental Iron Work Co., the Respondent, inter alia, to make whole employees for their losses resulting from its unfair labor practices. The United States Court of Appeals for the Sixth Circuit enforced the Board's Order in its entirety on June 11, 1991.<sup>2</sup> A controversy having arisen over the amount of backpay due under the terms of the Board's Order, as enforced by the court of appeals, the Regional Director for Region 8 issued a compliance specification and notice of hearing on September 30, 1991, notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Respondent filed an answer.

On December 16, 1991, the General Counsel filed with the Board in Washington, D.C., a Motion to the National Labor Relations Board to Strike, in Part, Respondent's Answer and for Partial Summary Judgment. The General Counsel argues that the Board should strike the Respondent's answer, except those portions of the answer relating to certain discriminatees' interim earnings and medical expenses, because the answer failed specifically to admit, deny, explain, or fairly meet the substance of the allegations set forth in the compliance specification pursuant to the requirements of Section 102.56(b) of the Board's Rules and Regulations.

On December 19, 1991, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

**Ruling on the Motion to Strike, in Part,  
Respondent's Answer and for Partial Summary  
Judgment**

Section 102.56(b) and (c) of the National Labor Relations Board's Rules and Regulations states:

<sup>1</sup> 295 NLRB No. 53.

<sup>2</sup> *NLRB v. Ornamental Iron Work Co.*, Case 90-6020 (unpublished).

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

We agree with the General Counsel that the Respondent's answer to the compliance specification is substantively deficient, except with regard to those portions dealing with medical expenses and interim earnings.<sup>3</sup>

In particular, the Respondent asserted in its answer that discriminatees Daniel Amhauser, Richard Marzich,

<sup>3</sup> Although it may appear that the General Counsel sought to exclude from its motion to strike the Respondent's answer in part and motion for partial summary judgment those portions of the Respondent's answer related to reinstatement offers of discriminatees Daniel Amhauser, Richard Marzich, Lee Vue, and Zanna Vue, it is clear from the context of the entire document that the General Counsel's motion excludes only the medical expenses of Daniel Amhauser, Louis Domico, and Henry Petz, and the interim earnings of Henry Petz and Larry Winkler.

Lee Vue, and Zanna Vue were not entitled to backpay because the Respondent unconditionally offered them reinstatement as soon as jobs became available for them; however, the Respondent did not specify when those reinstatement offers were made, what positions were offered, or any other details about the offers. Moreover, the Respondent stated that it attached to its response to the Notice to Show Cause photocopies of the reinstatement offer letters mailed to all 15 discriminatees in this case. The Respondent did, in fact, attach copies of reinstatement offer letters addressed to 11 of the discriminatees, but there were no such letters addressed to Amhauser, Marzich, Lee Vue, or Zanna Vue.

Further, the Respondent argued in its answer to the compliance specification, as well as in its response to the Notice to Show Cause, that backpay should be computed using the lower wage rates it offered the discriminatees upon reinstatement. The Respondent's argument is based on an incorrect legal theory, i.e., that once it discharged the striking employees, the Respondent was free to pay them wages upon reinstatement at whatever rate the market would bear, and that those lower wage rates should apply retroactively throughout the backpay period. The Respondent's legal theory is erroneous because at all relevant times it was under a statutory obligation to bargain with the Union before changing employee terms and conditions of employment. In sum, the Respondent has not satisfactorily explained why it was free unilaterally to lower the strikers' wage rates after unlawfully discriminating against them. Accordingly, we reject the Respondent's challenge to the General Counsel's use of the discriminatees' prestrike wage rates as the basis for determining gross backpay.

Finally, we find, contrary to the Respondent's assertions, that the General Counsel has taken into consideration the availability of work when setting the dates of each discriminatee's backpay period. The backpay periods of only two discriminatees, Daniel Amhauser and Henry Petz, have been set to begin before April 1988,

the date when, according to the Respondent, fabrication work began to be available for unit employees. The Respondent has failed to explain how Amhauser's and Petz' work may have been affected by the lack of fabrication work before April 1988. In the absence of such an explanation, we cannot find that the Respondent has responded to this aspect of the compliance specification with requisite specificity.

The remainder of the Respondent's answer fails specifically to admit, deny, explain, or meet the substance of any of the allegations set forth in the compliance specification as required by Section 102.56(b). Accordingly, we shall strike the Respondent's answer except insofar as the answer relates to the medical expenses of discriminatees Daniel Amhauser, Louis Domico, and Henry Petz, and to the interim earnings of discriminatees Henry Petz and Larry Winkler. We therefore grant the General Counsel's Motion to Strike, in Part, Respondent's Answer and for Partial Summary Judgment.

### ORDER

It is ordered that the General Counsel's Motion to Strike, in Part, Respondent's Answer and for Partial Summary Judgment be granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 8 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, which shall be limited to taking evidence concerning the interim earnings of Henry Petz and Larry Winkler and the medical expenses of Daniel Amhauser, Louis Domico, and Henry Petz.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a decision containing findings, conclusions, and recommendations based on all the record evidence. Following the service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.